REVIEWS IN ADVANCE

Neoliberalism, Post-Communism, and the Law

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Abstract

Neoliberalism represents the revival of economic liberalism that has been taking place since the late 1970s. Its main premise is that the market is morally and practically superior to government and any form of political control intended to improve on market outcomes. Central and Eastern European countries (CEEs) were global leaders in the adoption of neoliberal ideas and policies during the 1990s and 2000s. Almost all CEEs adopted neoliberal ideas and policies at a dramatic rate and are now among the most open economies in Europe. This was particularly true during the early transition period, when neoliberalism emerged as a virtually unchallenged ideology strongly dominating the course of economic and political reforms in the region. CEEs largely followed the script written by the authors of the Washington consensus and implemented monetary stabilization, economic liberalization, and a grand-scale privatization of the largely state-owned economy. This article traces the role of law during the first 25 years of transition and its relationship with neoliberal policies and institutions that were put in place in CEEs. It does so chronologically, through three different periods of transition, which also represent the quite different roles that the law assumed in the process.

INTRODUCTION

Neoliberalism represents the revival of economic liberalism that has been taking place since the late 1970s. Its main premise is that the market is morally and practically superior to government when it comes to regulation of the economy (Harvey 2005, p. 2; Heywood 2003, pp. 54–55). This market fundamentalism represents the core of the intellectual doctrine of neoliberalism. Neoliberalism purports to elevate the market above politics, "that is, to free it from political interventions of any kind" (Mudge 2008, p. 715). Such a dethronement of politics should be achieved, as neoliberalism argues, by getting the state out of the business of running the economy. Hence, neoliberalism not only is "a one dimensional set of economic ideas directed at promoting the free market, but is an ideology with broader political dimensions" (Turner 2008, p. 47). Therefore, the role and rule of (constitutional) law in helping to detach the markets from political interference and related depoliticization of decision making are essential components of neoliberal political doctrine. As a consequence, neoliberalism is "also a philosophy of political democracy and the role of the state" (Schmidt & Thatcher 2013, p. 7).

Neoliberalism's practical face is best known as a set of interrelated policies intended "to increase the role of markets in regulating public life" (Evans & Sewell 2013, p. 37). Neoliberalism as a policy paradigm is best known as the Washington consensus. The term Washington consensus usually refers to a set of policies advocating economic liberalization, privatization, deregulation, depoliticization, and fiscal austerity, which were initially designed in the 1980s and 1990s by the International Monetary Fund (IMF), the World Bank, and the US Treasury to respond to the economic crisis in Latin America.[1] Later, a similar set of policies was applied to former Communist countries in Central and Eastern Europe (CEEs).[2] CEEs were global leaders in the adoption of neoliberal ideas and policies during the 1990s and 2000s. Almost all CEEs adopted neoliberal ideas and policies "at a dramatic rate" and are now among the most open economies in Europe (Orenstein 2013a, p. 375; 2013b). This was particularly true during the early transition period, often described as the period of shock therapy, when neoliberalism emerged as a virtually unchallenged ideology, strongly dominating the course of economic and political reforms in the region. CEEs largely followed the script written by the authors of the Washington consensus and implemented monetary stabilization, economic liberalization, and a radical privatization of the largely state-owned economy.

During the first two decades of transition (1989–2009), CEEs evolved into three distinct types of capitalism (Bohle & Greskovits 2007). The first two types, present in the Baltic (Estonia, Latvia, and Lithuania) and Visegrád states (the Czech Republic, Poland, Hungary, and Slovakia), represented variations of neoliberal capitalism. Only the third type, found in Slovenia, represented a distinct type of neoliberalism embedded in corporativist institutions and a generous welfare state.

The role of law in this first period was geared toward the institutionalization of a particular model of market economy, where protection of property and contracts, together with the expanded role of the judiciary, was meant to provide the best guarantees for such a court-centered market economy. This was the period when CEEs were engaged in simultaneous economic and political reforms, and when CEEs' commitment to neoliberal economics was complemented by a commitment to democratic policies (Szelenyi 2015, p. 41). Nevertheless, the law's limiting role, often described as negative constitutionalism, clearly overshadowed its facilitating role, in the form of positive constitutionalism (Holmes 1995, Krygier 2016). In negative constitutionalism, the law

[1]The term was coined by John Williamson in 1989 (see Williamson 1989, p. 7).

[2]In the article I discuss the EU member countries from Central and Eastern Europe.

figures primarily as a limiting device, as a means aimed to limit or restrain the power of government. Positive constitutionalism maintains that the law also has an empowering role, which, under the right conditions, can "increase the state's capacity to focus in specific problems and mobilize collective resources for common purposes" (Holmes 1995, p. xi). CEE reformers almost completely neglected the importance of building public law structures required for more interventionist and redistributive state policies. Assigning to the law the role of undoing the socialist state was congruent with the motto of that period: no more experiments.

The initial phase of shock therapy, which lasted until the mid-1990s, was later replaced with a more diverse set of neoliberal variations. During this second period of transition, the content of neoliberal policies, though almost universal in its general affirmation of core neoliberal principles, varied significantly between CEEs. There were many local adaptations of neoliberal general principles to different local contexts (Ban 2016). In such cases, the limiting role of the law was reconfigured to fit not only EU expectations regarding its regulatory model of governance but also domestic political concerns voiced by variegated political responses to the prolonged economic stagnation that followed the shock therapy. Hence, the role of public law and various regulatory structures was strengthened but, in alignment with the EU model of horizontal industrial policy, carried mostly through various independent regulatory bodies. The varieties of neoliberalism that emerged during the first two decades of transition show the resilience and adaptability of neoliberalism (Schmidt & Thatcher 2013).

This state of affairs continued until the financial crisis in 2008 and the euro-zone crisis, when an alternative set of economic and political ideas emerged in the region. Neoliberal economic policies are being gradually replaced with various statist models of development, based on nationalization of banks, punitive taxation of foreign banks, and economic protectionism (Applebaum 2016). At the same time, political liberalism is being challenged by open flirtation with illiberal and authoritarian forms of government (Müller 2014).

This article traces the role of law during the first 25 years of transition and its relationship to neoliberal policies and institutions that were put in place in CEEs in that period. It does so chronologically through three different periods of transition, during which the law assumed quite different forms and functions. If the early period shows a dominance of negative constitutionalism, the second phase exhibits a strong element of positive constitutionalism, complementing the first. And finally, the last period, after the financial crisis of 2008, signals a turn to authoritarian and illiberal constitutionalism.

LEGAL FOUNDATIONS OF POST-COMMUNIST DEMOCRACIES: THE PRIMACY OF MARKETS AND COURTS[3]

The majority of the regulatory structures in contemporary CEEs were built during the age of the Washington consensus. As we know today, the Washington consensus had a strong antistatist bias. More attention was paid to courts, judges, property law, and contracts and less to administrative agencies, civil servants, and regulatory policies needed to implement various regulatory policies of the state. The neoliberal ideology underpinning the Washington consensus was antistatist in the sense that it did not provide much room for the state as a regulator of economic activity. According to the mentality of the time, "The main thing that needed to be done was to get the state out of the way, and somehow everything else would take care of itself" (Trubek 2006, p. 85). The only role left for the state was to protect property rights, enforce contracts and criminal

[3] Parts of this and next section are drawn from Bugarič (2014).

law, and protect against arbitrary use of governmental power. Apart from that, the market was considered the optimal mechanism for regulating economic activity. As Kennedy (2013, p. 43) succinctly argued, the aim of the legal program of neoliberalism "was not an improved exercise of state power but to disentangle the state from the market and establish more effective restraints on government rent-seeking and public choice bickering. All this was to be done by law."

It is therefore hardly a surprise that during the initial stage of the transition, the process of building state institutions was less important than the process of economic reform, the key element of which was a process of radical privatization of state-owned enterprises. Namely, the assumption behind the process of radical privatization was that a massive sale of state property would, by itself, lead to a just and efficient allocation of property rights. The reformers neglected the importance of oversight and regulation of privatization needed to prevent the development of corrupt and inefficient privatization patterns. The logic behind the radical privatization was that it would somehow by itself create a new class of property owners who would in turn represent the new capitalist middle class, essential for the creation of a market economy. According to two very influential neoliberal authors, who were also actively engaged in the process of privatization in Russia, "Privatization . . . . offers an enormous political benefit for the creation of institutions supporting private property because it creates the very private owners who then begin lobbying the government . . . . to create market-supporting institutions . . . . [Such] *institutions would follow private property rather than the other way around*" (Shleifer & Vishny 1998, pp. 10–11, emphasis added). However, retrospectively, nothing could be further from the truth. With almost complete absence of any regulatory institutions, rule of law, policies, or other elements of a supportive institutional environment, the process of radical privatization led to a massive theft of state property, corruption, and "capitalism with a comrade's face" (Frydman et al. 1998, p. 42), thus benefiting the old *nomenklatura* instead of creating a new class of "real" capitalists. Even Milton Friedman, a guru of neoliberalism, when reflecting on post-Communist Russia, admitted, "It turns out that the rule of law is probably more basic than privatization. Privatization is meaningless if you don't have the rule of law" (Friedman 2002, p. xviii). Moreover, as Hamm et al. (2012, p. 301) argue, radical privatization's combined effect was to weaken "development of the very institutions needed for governing the private sector." As a consequence, the same authors argue in one of the first comprehensive sociological studies of privatization in CEEs that "mass privatization negatively affected state capacity in three areas: government inefficiency, unofficial payment/bribery, and weakened protection of property rights" (Hamm et al. 2012, p. 316).

This aspect of post-Communist constitutionalism is brilliantly problematized by Grażyna Skąpska in her contrast between "institutional optimism" on the one hand, which was largely based on the neoliberal understanding of market economy, and "sociological realism" on the other, which cautioned against the naïve neoliberal belief that markets would take care of themselves. Instead, the realists emphasized

> the weakness of postcommunist governments, their lack of resources for efficient implementation of law and protection of the rule of law and constitutional rights and guarantees, in circumstances of overwhelming social change. Protection of the rule of law as well as of negative rights and liberties is quite costly, and even the limited liberal state, or even especially the limited liberal state, must have the needed financial resources to be effective. These were quite scarce after the collapse of communism. (Skąpska 2009, p. 289)

Using the case of the privatization of state-owned property in the CEEs, with main focus on Poland, which is widely thought to have been the great success story of the process, Skąpska shows how a neglect of such contextual features, among them the absence of almost any kind of regulation

of the privatization process itself, led not to a wide distribution of property rights and a smooth transition to capitalism but instead to corruption, nepotism, and clientelism as key mechanisms of privatization.

The Russian example of corrupt *privatizatsiya*, which led to the creation of a group of oligarchs who controlled vast sectors of the Russian economy, is only the most extreme manifestation of this problem. A corrupt, kleptocratic oligarchic layer with close ties to their respective governments has emerged in CEEs as well. This social phenomenon started with privatization throughout Eastern Europe, when privileged groups close to power robbed the state. Corruption and tax evasion are an old malaise in these countries, including in the highest echelon of the political establishment, which is well-reflected in the major scandals involving the Croat and Romanian prime ministers (Berend & Bugarič 2015, pp. 771–72). But in the Polish context, for example, privatization was fairer and less corrupt, mainly due to the strong political competition of various political parties, which played a major role in preventing many negative side effects of privatization. However, it was only much later that the differences among various forms of post-Communism were acknowledged and taken seriously in the transition literature.

The neoliberal hegemony, achieved primarily on the battlefield of ideas (C. Ban, manuscript forthcoming), was also strengthened by direct political interventions by the Washington consensus institutions. As one early study on the transition reports, neoliberal experts deliberately weakened potential agents of industrial restructuring in the region (Amsden et al. 1994, p. 119). For example, in Poland and Hungary, the World Bank explicitly required respective governments to disempower the ministries of industry, responsible for development and industrial policy, while providing both technical and financial assistance to ministries of privatization, which became the most effective government bureaucracies in the region. In Poland, the ministry of privatization had a special status within the government and was exempt from ceilings on civil service pay scales, which enabled it to attract the most capable staff members. Next, the World Bank imposed a de facto ban on development banking. The Polish Development Bank's autonomy in lending directly to industry was limited by the World Bank's loan conditions. The theory behind such institutional unbuilding was the "do nothing policy," based on the idea that once proper institutions for the market economy had emerged, the markets would do the rest of the job. Instead of pursuing their own industrial or developmental policy, CEEs invested heavily in various structural reforms, another term used by the Washington consensus ideology, which amounted to deindustrialization rather than reindustrialization.

The initial result of the Washington consensus' big bang approach in CEEs was much lower GDP per capita; increased poverty; rising inequality; a decline in life expectancy of up to six years; and higher rates of social alienation, depression, and alcoholism. Whereas in 1988, only 2% of the population in the socialist countries of Europe lived in absolute poverty, 10 years later more than 20% did, with the rapid transition estimated to have led to between 3 and 10 million premature deaths (Drahokoupil & Myant 2010). Although many CEE economies had regained lost ground by the mid-1990s, growth rates and GDP per capita still lagged behind those of East Asian countries. Poland is the only country in the region that managed to almost double its GDP in the period between 1989 and 2010. During the first few years, the social shock of transformation in other countries in the region had an enormous impact, leading to a large percentage of society—in some cases as much as 20–30%—falling into poverty. As Guy Standing (1996, p. 230) argues, the welfare retrenchment in CEEs represents the first case in history in which international financial agencies shaped and influenced social policy reforms. This situation gradually improved, but the wage level, even counting purchasing power in the better-developed countries, is less than half of the West European standard. Income differentiation has strongly increased. The Gini coefficient, which measures income diversity from 0 to 1, increased from about 0.22–0.24 to about 0.31–0.35,

with the increase being quite dramatic particularly in the Baltic countries, Romania, and Hungary. This was in sharp contrast with several West European and Scandinavian countries, where the income gap hardly changed and remained at the level of 0.26–0.28. Russia approached the Third World countries, with an income inequality of about 0.45. No surprise then that "growing concern about the severity of the social suffering and inequalities has forced the neo-liberal agenda onto the defensive in many parts of the region" (Standing 1996, p. 251). As we see in the next section, the negative experience of this prolonged depression and social suffering clearly affected the course of welfare reforms in the next decade. Only the Baltic states remained faithful to the neoliberal script of rolling back the (welfare) state, whereas the Visegrád countries and Slovenia have embedded their neoliberalisms within more or less generous welfare states (Bohle & Greskovits 2007, p. 447).

The hegemony of neoliberalism was most visible and tangible in the sphere of economic reforms, where neoliberal ideas and policies enjoyed almost uncontested hegemony in the post-Communist world. Yet, the reformers were also strong democrats and supporters of human rights ideology. As Ivan Szelenyi (2015, p. 41) observes, the commitment to neoliberal economic ideals was complemented with a strong commitment to democratic policies. The early years of transition were also a time of huge constitutional experiments, during which CEEs basically had to redesign their constitutional structures from scratch (Elster et al. 1998). Following various roundtable talks, in which former Communists negotiated the details of future constitutional intricacies with newly emerging opposition leaders like Havel, Michnik, and Wałęsa, most CEEs adopted new, modern, liberally inspired constitutions. Much of the attention of the reformers was devoted to such issues as electoral systems, parliamentary models, and the desired list of basic rights. Nonetheless, the emerging constitutional model had a peculiarly CEE flavor. As Kennedy (2013, p. 45) argues, the focus shifted from public to private law. The law emerged as a limit on the state on the discretion of administrators and the mandate of legislators. Private rights, constitutional procedures, judicial review, international obligations—all were intended to constrain the neoliberal state. Thus, the main emphasis was less on positive constitutionalism, i.e., those aspects that enable the state to carry its own functions, than on negative constitutionalism, primarily concerned with its constraining role vis-à-vis the state. This antistatism had a plausible explanation, since it represented a deep distrust among the leading dissidents of the past totalitarian and interventionist state. As Moyn (2014, p. 156) argues, a strange coalition between neoliberalism and human rights in CEEs can be explained by their common target and a predecessor, a developmentalist statism. Moreover, they also share key ideological building blocks: a commitment to the primacy of the individual with her fundamental human rights, which according to the human rights ideology have ontological priority vis-à-vis the state.

No surprise then that constitutional courts became one of the most powerful new institutions in the new democracies. Constitutional courts best exemplify both neoliberal and human rights preoccupation with protection of basic human rights and constraining the role of the courts in new democracies. Constitutional courts are now important veto-players in the politics of post-Communist Eastern European countries. Although under Communist Party rule constitutional courts existed in only one country (Yugoslavia), they are now a critical element in almost all CEEs. The importance of these constitutional courts continues to increase as their judgments attract widespread attention from the legal profession and broader political audiences. The constitutional courts of Hungary, Poland, Slovakia, Slovenia, and Bulgaria emerged over a relatively short period of time as one of the most influential forms of political institutions in the region. Their power to review the constitutionality of statutes challenged the almost absolute supremacy the legislatures previously enjoyed (Schwartz 2000). The Hungarian Constitutional Court emerged as the most powerful court in the world during the 1990s, as Kim Lane Scheppele (2003, p. 227) argued. Some of the courts became powerful and respected institutions with a strong record of protection of many

basic rights from newly adopted CEE constitutions. Interestingly, their record also shows that their case law cannot be easily subsumed under the dominant strand of negative constitutionalism characteristic of that period. The Hungarian Court, under the strong leadership of liberal Chief Justice Sólyom, issued a series of decisions in 1995 that required a modification of the so-called Bokros plan, an IMF-required austerity program (Scheppele 2004). The Polish experience with judicial involvement in economic and social rights also "shows that there is a very significant and quite manageable role for the judiciary in the protection of economic and social interests" (Schwartz 2000, pp. 72–73). To a lesser extent, the Slovenian, Bulgarian, and Slovak Courts also decided a number of cases protecting the social and economic rights of their citizens (Bugarič 2001). Nevertheless, it would be far-fetched to argue that the courts' decisions drastically changed the course of neoliberal economic reforms in the region.

As Mitchell Orenstein (2013a, p. 379) claims, not only were domestic political elites in CEEs quite eager "model-takers" willing to adopt the basic tenets of neoliberalism, they also had a very limited range of options:

> Ultimately, Central and Eastern European countries had few choices if they wanted to integrate into Western economic structures. They could choose to adopt neoliberal economic ideas and enjoy Western support or to adopt some alternative and lose it. For countries that wished to escape the Soviet bloc and join the European Union, there was no real choice. Adoption of neoliberal ideas was a sine qua non for membership in the Western club. Western governments and international institutions launched an enormous assistance effort to help Central and Eastern European countries implement neoliberal ideas. This effort was coordinated at the governmental level by the G-24 and organized through the IMF and World Bank, as well as the EU's PHARE program.

The neoliberal legal theory was highly formalistic. Much emphasis was placed on formal rules aimed at constraining public authority on the one hand and at creating the "right rules" for market actors on the other. CEEs created institutions that, compared to the West, are "more formal, more constraining of public authority over the economy, less open to institutional variation and less well embedded in the local institutional, social and economic context" (Kennedy 2013, pp. 44–45). As David Kennedy argues (2013, p. 46), "the goal was less to ensure that state functionaries understood the needs of national development, than that both public and private experts understand the needs of (largely foreign) capital and are able to formulate rules to 'open markets' and encourage its arrival."

The importance of formal rules was so great that the law-and-development paradigm from the early 1960s was replaced with the "rule of law" model (Trubek 2006, p. 86). As Sherman (2009, p. 1264) argues, "a central characteristic of this rule of law project was the idea that the formalization of Western-style law in the developing world was sufficient for promoting economic development." Furthermore, according to the rule of law model, only one model of the rule of law was appropriate for all countries. This rule of law model was composed of a set of institutions that are typically found in the Anglo-American world. Therefore, the rule of law model was accompanied by a strong belief in the possibility of legal transplantation. One of the most flawed views of the Washington consensus was that a single set of most appropriate institutions—which are typically found in Anglo-American countries, rule of law being one of them—is required for successful development. Such a naïve model confused description with prescription. The real life of institutions like parliamentary democracy, corporate governance, civil service, or judicial review shows that they can assume many different forms (Unger 1996, p. 7). Only when discussed in highly abstract terms do these institutions appear to be uniform, core institutional structures (e.g., independent judiciary, accountable government) that every democracy based on the rule of law

must contain. With further qualification and specification, it becomes clear that these institutional structures have several possible alternative forms. Nevertheless, such a simplistic model prevailed in the neoliberal thinking of the last two decades.

With its pronounced emphasis on property, contracts, and the administration of the judiciary, the rule of law model almost completely disregarded the importance of the state and its many regulatory functions, i.e., the role of the executive, legislature, regulatory agencies, and civil service and the public regulation of markets. It is hardly a surprise, then, that during the initial stage of the transition, public law reforms were not given the attention they deserved. As Suleiman (2003, p. 287) argues, "one of the most striking aspects of the transition process in Central and Eastern Europe was the absence of recognition, at least in the essential phase of the transition, that a professional bureaucracy is crucial to both the consolidation of the democratic process and the imperatives of economic development."

It was only during the accession period of the EU enlargement that reforms of civil service, regulatory agencies, and anticorruption commissions emerged high on the agenda of both the CEE governments and the EU Commission. But given the prevalent mentality of the time, even the EU-initiated reforms of public law institutions could not entirely escape the dogmatic formalism of neoliberal experts. In other words, civil service reforms, anticorruption campaigns, transparency initiatives, and, more recently, creation of new developmental agencies were mostly about creating more and more new rules. If the rules did not function, then they were replaced with a new set of rules.

BUILDING A NEOLIBERAL DEVELOPMENTAL STATE: VARIETIES OF NEOLIBERALISM IN CEES

The second period of transition largely coincides with the period of accession to the European Union and ultimately with the EU membership of 10 CEEs in 2004 and 2007. This period was also marked by an improved global economic outlook, which helped CEEs achieve impressive economic growth in the mid-2000s, "whether or not they had imposed radical reforms" (Orenstein 2013b, p. 235). The role of law shifted from the emphasis on negative constitutionalism to various examples of positive constitutionalism concerned with the improvement of the public sector, civil service, and regulatory agencies and, interestingly, to the development of a distinct, neoliberal developmental state. The new, neoliberal developmental state, however, did not represent a radical break with the previous blind following of market fundamentalism. Core economic policies remained firmly neoliberal and market oriented, sometimes augmented only with new policies aimed at correcting so-called market failures of otherwise perfect markets. In other words, the neoliberal developmental state represented only an accommodation, a local adaptation of neoliberal doctrines to different, "actually exisiting neoliberalisms" on the ground (Hirt et al. 2013, p. 1243). Not an oxymoron, the neoliberal developmental state is characterized by a strong reliance on promarket (neoliberal) economic policies, sometimes mixed with a European Union–inspired Keynesianism via the Structural Funds and Cohesion Fund (Hirt et al. 2013, p. 1248). If during the early stage of state reforms CEEs followed a one-size-fits-all approach and hastened to transplant various Western-style administrative structures without paying sufficient attention to social context, and disregarding the policy relevance of such rules, this second period of transition was marked by a growing importance of "varieties of neo-liberalism" (Ban 2016). As already mentioned, CEEs evolved into three distinct types of capitalism (Bohle & Greskovits 2007).

Reforms of various parts of public law, with the exception of constitutional courts and independent central banks, were not a key policy priority during the first stage of the transition. Given the antistatist bias prevalent among the reformers of that time, this is not surprising. It is only

during the accession negotiations with the European Union that public law reforms became an important item on the policy agenda of the CEE governments. Before that period, the neoliberal development experts were more interested in unbuilding and disestablishing prior Communist state structures than in building new ones.

The EU-initiated accession negotiations with the candidate countries of CEE brought an important modification to the previous neoliberal antistatist policy. Because a vast part of the EU administration depends on indirect administration carried out by member states, it is unsurprising that the Commission decided to scrutinize the administrative capacity of the CEE's national administrations to apply the *acquis*, that is, the 80,000 pages of EU legislation that the European Union required that candidate countries fulfill before being admitted to the European Union. The Commission strongly insisted on the adoption of civil service legislation as a start for administrative reforms. The legalistic nature of civil service reforms can be explained by the insistence of the Commission on adoption of civil service laws and by the prevailing legalistic tradition in CEEs. At the Commission's insistence, most of the CEEs hurried with the adoption of civil service laws. Whereas before 1997 only Hungary, Poland, Latvia, Estonia, and Lithuania had passed civil service legislation, in the period from 1997 to 2002, all other CEEs had done so. The Slovak law from 2001 "was a formality designed to satisfy the European Union" (O'Dwyer 2002, p. 31).

The preaccession civil service systems in CEEs suffered from some common problems and dysfunctions. These systems were plagued by a strong politicization of civil service; an absence of a culture of political neutrality; a lack of mobility in civil service personnel policy; decentralization and fragmentation of personnel and pay policy; the lack of a central agency responsible for the recruitment and dismissal of civil servants; poorly paid staff; and, last but not least, a poor image of the civil service. Verheijen (2003, p. 491) argues that adoption of civil service laws "has not resolved the problems of instability and politicisation and has rarely led to the development of a well-working system of long-term career development." A World Bank (2006, p. 50) study also reports "a mixed picture of overall setbacks, especially since accession with some promising innovations, particularly in the Baltic States." One of the setbacks has to do with the return of politicization. The study reports that "the very idea of an impartial and professional civil service, based on merit and continuity, appears to have lost its appeal to the political leadership of most of the new Member States" (World Bank 2006, p. 10). The Baltic states are an exception here. They have the least politicized senior civil service in the region. They, particularly Estonia, were heavily influenced by the Swedish and Finnish model of public administration. One of the key differences between the Scandinavian and other continental European models of public administration is a greater degree of flexibility and managerialism in the first group.

CEEs, with the exception of the Baltic states, adopted the wrong strategy of administrative reforms. With an overreliance on legislation, buttressed by a strong legalistic tradition already present there, CEEs sought to adopt new civil service laws first and reform people later. As Verheijen argued, they first should have designed appropriate strategic approaches, invested more in training and education, and devoted more time to tackling structural problems. For example, to tackle the problem of overt politicization with almost exclusive focus on legislative aspect of reforms is not a good strategy: "Designing and adopting civil service legislation without attacking the root causes of the problems in the administration in the first has proved to be a highly inadequate reform strategy" (Verheijen 2003, p. 496). Depoliticization of the civil service is an immensely difficult task. Most developed democracies in the West spent decades building a political culture of neutral and apolitical public administration. On the contrary, as Meyer-Sahling (2004, p. 98) shows, the political parties in the region were locked in the spiraling process of the continuous politicization of civil service, where each newly elected government suspended or radically modified the administrative reforms of its predecessor. In such a climate of heightened political

distrust among the key political actors, it is nearly impossible to agree and even more difficult to implement any serious administrative reform. Administrative reforms in developed democracies are usually piecemeal and take several years to develop. They require the strong support of all major political forces. Without changing training and education systems first, it is very näive to believe that passing a new law would solve the problem by itself. Yet, in all CEEs we can discern an almost fetishistic focus on the production of new legislation that was often dissociated from its own implementation. Such processes often degenerated into "symbolic politics," resulting in adoption of laws that cannot be enforced.

As the example of civil service reforms shows, CEEs, with the Baltic exception, still lack a competent and professional bureaucracy that would be sufficiently capable and autonomous from political patronage. And yet, "promoting effective public sectors is one of the most daunting development challenges that the world faces" (Birdsall & Fukuyama 2011, p. 51). Such a bureaucracy is a prerequisite urgently needed in a country contemplating any use of newer forms of industrial policy.

Quite paradoxically, as CEEs focused on formalistic rules aimed at limiting discretion and undue political influence over bureaucracy, they ended up with civil service structures that were neither sufficiently competent nor autonomous from political pressure. But civil service is not the only example showing such results. A very similar pattern can be found in other areas of institutional reforms in CEEs, such as anticorruption campaigns, transparency legislation, and creation of new developmental agencies (Batory 2012, Dimitrova 2007). It is the excessive focus on rules and legislation, dissociated from policy goals and social context, that has largely contributed to the creation of such "formal structures without substance," i.e., institutions that look similar to their Western-style counterparts but fail to produce expected results (Bugarič 2006). As Trubek (2009) and Kennedy (2013) argue, different theories about law and development are always embedded in different theories of political economy, which in turn means that law is embedded in different development policies. Hence, neoliberal developmental states and their legal institutions were embedded in various forms of neoliberal capitalisms that emerged in CEEs.

The first country to challenge the neoliberal prescriptions was Poland. Inspired by the program "The Strategy for Poland" (King & Sznajder 2006, p. 774), the left-center Polish government combined a pragmatic economic approach that included "heterodox" economic policies that ran against the neoliberal prescriptions, with gradual improvements in the market economy institutions. Instead of immediately privatizing the entire state sector, the Polish government implemented a commercialization of the public sector, which meant that state-owned enterprises were exposed to competitive pressure and subjected to tough budget constraints, similarly to the private sector. On the other hand, privatization was rationalized in order to help improve the double goal of microeconomic efficiency and maximization of government revenue. In short, "neoliberal doctrinarism was abandoned for a pragmatic approach based on economic rationalism" (Kołodko 2009, p. 2). The key architect of this "state-led transition" to liberal capitalism was Grzegorz Kołodko, a new finance minister with strong Keynesian and preindustrial leanings. Last but not least, Poland emphasized some factors that were usually neglected by the IMF, such as the importance of democratic support for the reforms, which entailed its concern for keeping unemployment low, providing benefits for the unemployed, and adjusting pensions for inflation, and also the importance of public dialogue and social partnership with trade unions and business organizations (Stiglitz 2004, p. 181). Interestingly, such a pragmatic approach to economic policy was also continued during the Citizens's Platform government (PO, Platforma Obywatelska), which came from a strong liberal tradition but took a more pragmatic approach to economic policy, deploying the state as a strategic actor when needed to protect the interests of the Polish

economy (Rae 2013, p. 414). As a result, Poland was the only country in the region to almost double its GDP from 1989 to 2010.

Instead of focusing on the neoliberal formalized approach to institutions, the Polish government adopted a more pragmatic and policy-oriented style of administrative reforms. Special attention was given to the recruitment of qualified people, special programs for teaching and training were established, and special codes/regulations on civil service were introduced. The government was doing its best to engage the nonpartisan technocrats and pay them as much as the budget would allow.[4]

This was quite different from other CEEs, which were mostly preoccupied with building "ideal" institutions as propagated by the neoliberal doctrine. With such "imperfect" institutions, the Polish government pursued pragmatic economic policies, which in combination contributed to spectacular economic results. What the Polish case shows is that "effective institutions have to evolve indigenously, reflecting a country's own political, social, and cultural realities. . . . Institutions such as the rule of law will rarely work if they are simply copied from abroad; societies must buy into their content" (Birdsall & Fukuyama 2011, p. 51). As Fukuyama argues, many countries, beginning with China, have developed rapidly in the absence of "good governance" institutions. But there are also countries like the United States and Britain that made the industrial revolution with governments that were substantially more corrupt and less capable than they are today (Fukuyama 2012). What matters most is that institutions are relevant and appropriate for a country's development goals and policies, and that institution building is not treated as something prior to or separate from the formulation of development policies. And, as the Polish case reveals, it is equally important that a country has a "right" development policy in the first place. By rejecting the neoliberal orthodoxy of "do-nothing" industrial policy and replacing it with more pragmatic "heterodox" economic policies, Poland achieved better economic results than countries that simply followed the neoliberal advice.

The second major exception to do-nothing industrial or development policy in CEEs is the innovation policy, which was heavily promoted and supported by the EU structural funds starting in 2004. Since 2004, innovation policies in CEEs represent the most important form of industrial policy with a much more active role of the state. During the first stage of transition, innovation policy was basically substituted for the Washington consensus policies of "structural adjustment." Innovation policy proper was not considered important to the neoliberal development experts. Almost all economic capacity building was directed toward macroeconomic issues: "Industrial policy thinking of the early transition governments was characterized by an outspoken liberal approach, leaving structural change entirely to the market" (Torok 2007, p. 255).

Already in the late 1990s, such an approach to industrial policy gradually began to shift to various forms of more horizontal innovation, technology, and regional policies, all representing an EU "implicit" version of industrial policy. All these various policies are part of the EU cohesion policy, which aims to reduce social and economic disparities and is conceptualized as "a partial counterbalance to the natural effects of the internal market by promoting a more balanced distribution of resources and economic development across the EU" (Nugent 2010, p. 339). The main policy instruments of cohesion policy are the Structural Funds and Cohesion Funds, which account for 40% of the total EU budget (€347 billion). During the 2007–2013 financial perspective, the innovation policy as a part of a broader set of initiatives known as the "knowledge economy" became one of the key priorities financed through the structural funds.

[4]Grzegorz W. Kolodko, email message to author, July 20, 2012.

Most CEEs made extensive use of the EU structural funds to promote their "implicit" industrial policies. For that purpose, most CEEs created special-purpose agencies: the Agency for Enterprise Development in Poland, the Slovak Innovation and Energy Agency (SIEA), the Lithuanian Science Council, the government's technology policy agency (OMFB) in Hungary, and several ministerial executive agencies in Slovenia. Owing to the rules of EU law on structural funding requiring regional and local institutions to administer the EU funds, a multilevel, decentralized system of various implementation agencies and other bodies on the national, regional, and local level was created subsequently. As a more complex, decentralized, and collaborative framework for industrial policy was created, it was clear from the outset that more traditional, top-down, statist versions of industrial policy were ruled out in this policy area.

However, as it turned out later, it was precisely this decentralized and fragmented institutional network that caused some major problems in developing successful innovation policies in the region. As one comparative study of innovation policy in the region argues, one of the major problems was caused by "increasing usage of independent implementation agencies in an already weak administrative capacity environment lacking policy skills for networking and long-term planning" (Kattel et al. 2009, p. 35). The same study reports that "almost all CEE innovation policy implementation problems go back to very weak and disorganized actors, coordination problems are rampant in policy design and innovation/industry on the ministerial level and its delivery system" (Kattel et al. 2009, p. 29). The fragmented policy-making system suffered from an acute absence of cooperation and learning between different actors like governments, industry, and research organizations. In other words, the creation of multiple independent agencies was one of the key innovation policy problems in CEEs.

Although the example of innovation policy clearly shows the importance of an adequate institutional framework for a successful developmental policy, it also reveals that creating appropriate institutions is not a process separate from devising appropriate policies themselves. In other words, the structure of a neoliberal developmental state, created to promote the neoliberal agenda, turned out to be inadequate for post-neoliberal innovation/development policies. Again, as in the example of administrative reforms, CEE reformers subscribed to an unduly formalized approach to institution building, without paying enough attention to other informal features required for such collaborative and decentralized policy framework to deliver expected results. One lesson for CEEs thus seems to be that these countries should abandon the overly formalistic approach to institution building and replace it with a new approach that understands the rule of law in a more informal, pragmatic, and revisable fashion.

The innovation policies in CEEs, with all their flaws, represent a truncated and less ambitious version of development policy if compared to a variety of policies practiced by the new development states around the world. Unlike countries like China or Brazil, CEEs lack both institutions and policies required for a more sophisticated approach to development. The examples from this article show that although the new policies represent an important break with the neoliberal development thinking, they still continue to be influenced by a strong residuum of the neoliberal doctrines and policies. There is still very little demand for new autonomous developmental policies in CEEs. As the case of innovation policy shows, even when they are in place, they are predominantly a result of the EU initiatives and less home driven.

Despite the flaws and weaknesses of the newly built neoliberal developmental states, the second period of transition was, if judged from the perspective of CEE growth rates, a success story. CEEs enjoyed uninterrupted and impressive growth until the global financial crisis (Szelenyi 2014). Creation of all kinds of new regulatory structures complemented the purely market-driven and court-centered approach to a market economy, emblematic of the first transition period. Nevertheless, the newly built neoliberal developmental states remained faithful to the core neoliberal

economic principles. They challenged them only on the margins of the neoliberal program. The most radical deviation from the Washington consensus principles, the Polish case, still represented merely the state-led model to neoliberal capitalism.

A common characteristic of these various neoliberal types of capitalism during the early transition period was an almost total absence of any indigenous developmental policies. A comparative study of industrial policy in the region finds that "[b]asically any government role in industrial development was challenged as a return to former policy practices, and a 'hands-off' pattern of industrial policy seemed to prevail in most CEECs" (Torok 2007, p. 256). Consequently, in the entire region there was very little demand for anything other than neoliberal developmental policies. Parts and pieces of industrial policy could be found in many different forms and variations, but they never developed into a more comprehensive, systematic development policy.

The region's economy is developing, but as a dependent backyard of the West. West European, US, and Japanese companies played central roles in the economic transformation of Central and Eastern Europe by establishing the banking industry and creating retail networks and modern, partly high-tech and medium high-tech industrial sectors. Economic growth, in other words, was for the most part unrelated to the effects of domestic research and development. It is therefore more appropriate to speak about the rise of a dual economy with an advanced export system and a less-developed, local sector–oriented domestic market (Berend & Bugarič 2015).

Andreas Nölke and Arjan Vliegenhart argue that because of their structural dependence on Western capital, knowledge, and technology, CEE economies represent a distinct type of capitalism, a dependent market economy (DME) type of capitalism. According to Nölke & Vliegenhart (2009, p. 672), DMEs "have comparative advantages in the assembly and production of relatively complex and durable consumer goods. These comparative advantages are based on institutional complementarities between skilled, but cheap, labor; the transfer of technological innovations within transnational enterprises; and the provision of capital via foreign direct investment (FDI)."

It will be quite some time before CEEs can be considered as economically "normal" and close to their Western neighbors. Hence, we can speak only about the first chapter of transformation, the systemic change within the framework of the European Union. A second main, and definitely much longer, chapter of this process is the foundation of domestically based intensive growth rather than import of capital, knowledge, and technology carried by multinational companies.

Following the 2008 financial crisis, the economic success of CEEs was brought to a halt and in most cases even reversed. As Orenstein (2013b, p. 236) shows, "every EU-10 country entered recession in 2009, with Poland the only exception; those countries who reformed the most fared by far the worst." The Baltic states experienced double-digit negative growth, Slovenia close to −10% negative growth. The radical openness, extreme dependence on foreign credit, and almost complete lack of domestic base, including domestic development policies, further exacerbated the already vulnerable position of these DMEs.

Moreover, the financial crisis also exposed many weaknesses of CEE political and legal institutions built during two decades of neoliberal hegemony in the region. As a consequence, CEEs are ill prepared to tackle new challenges produced by the financial crisis. Although there is, as a result of the current economic crisis, an increased functional demand for all kinds of new regulatory policies and structures, there are only a few high-quality regulatory structures and policies in place in CEEs. The civil service is prone to politicization and corruption, the public sector (e.g., education, health care) is in grave need of modernization, and various regulatory bodies and structures (e.g., anticorruption commissions, developmental agencies) lack necessary independence and credibility.

INSTEAD OF A CONCLUSION: THE RISE OF AUTHORITARIAN AND ILLIBERAL CONSTITUTIONALISM

As Orenstein (2013a, p. 375) argues,

> In today's Central and Eastern Europe, an alternative set of economic ideas is on the march, in particular the more interventionist state capitalist ideas championed by China for the past several decades and Russia under President Vladimir Putin. Prime Minister Viktor Orban of Hungary called his approach, adopted after his 2010 election victory, the 'Eastern winds' approach to economic policy, to distinguish it from Western liberalism.

Moreover, Jan Werner Müller (2014, p. 15) argues that in CEEs "something new is emerging: a form of illiberal democracy in which political parties try to capture the state for either ideological purposes or, more prosaically, economic gains." He points to an alarming similarity of these new forms of democracy to Putin's "managed" democracy: "Like Moscow, the governments of these countries are careful to maintain their democratic facades by holding regular elections. But their leaders have tried to systematically dismantle institutional checks and balances, making real turnovers in power increasingly difficult" (Müller 2014, p. 15). At the moment, the Hungarian version of illiberal democracy represents the most problematic example of this trend. The Fidesz government achieved a fundamental revision of the rules of the constitutional and political order in Hungary. In only five years (from 2010 to 2015), it managed to transform Hungary from one of the success stories of the transition from socialism to democracy into a semiauthoritarian regime based on an illiberal constitutional order by systematically dismantling checks and balances and thereby undermining the rule of law. The major deficiency of the new constitutional structure is that it vests so much power in the centralized executive that no real checks and balances exist to restrain this power. A newly elected far-right and populist Polish government of the Law and Justice party (PiS) is following the Hungarian path. Almost overnight, Prime Minister Beata Szydlo's new administration packed the Constitutional Court with five judges of its own choosing and refused to swear in the three judges properly appointed by the previous government. The PiS-controlled parliament passed a law reorganizing the court, requiring a two-thirds majority for any decision to be binding, instead of a simple majority, and requiring that 13 of the 15 judges hear a given case, instead of 9. The Court has at the moment only 12 judges, thus making it impossible, according to new rules, for the Court to annul Law and Justice–backed legislation. Moreover, the so-called Repair Act on the Constitutional Tribunal, as the new amending law has been ironically called, seems to be custom-made to paralyze the Court. Cases will have to wait in a docket for at least 6 months before they are decided. But the government went even further and gave the Sejm the power to terminate a judge's mandate, which directly contradicts the independence of the Court. The Venice Commission, an advisory body of constitutional experts, which advises the Strasbourg-based Council of Europe, issued a draft opinion strongly criticizing the Polish government that "the amendments endanger not only the rule of law, but also the functioning of the democratic system" (Venice Comm. 2016). Polish Prime Minister Szydlo told the Polish media that the Venice Commission findings were not legally binding on Poland. However, in March 2016, in a surprising move, the Polish Constitutional Tribunal struck down the provisions of the Repair Act, declaring that the Act violates the country's constitution. The government already announced that it would ignore the Court's ruling and refuse to publish it in the official Gazette, as required by the Constitution. As a consequence, it is most likely that the Court will survive this constitutional stalemate, but, according to Adam Bodnar, the human rights ombudsman at the Helsinki Foundation for Human Rights, "the question is whether its function will not be purely decorative" (Berendt 2016).

As Jiri Pehe, a former advisor of the late Czech president Vaclav Havel, argues, three out of four Visegrád countries are now single-handedly ruled by populist parties that show disrespect for the rule of law and the values of liberal democracy. In Slovakia, Robert Fico, a populist and authoritarian Social Democrat, won the parliamentary election in March 2016, after campaigning on an antimigrant ticket. In order to form a majority government, he needed coalition partners. Two of them come from the far right, the Slovak National Party (SNP) and the Siet Party, whereas the fourth, the Most-Hid party, represents the Hungarian minority. In a surprising development, a neo-Nazi party, People's Party–Our Slovakia, gained parliamentary seats for the first time. Party chairman Marian Kotleba was chairman of the banned neo-Nazi Slovak Togetherness-National Party, which organized anti-Roma rallies and expressed sympathy for the Slovak Nazi-puppet state during World War II. It would not be surprising if Fico's new coalition government joins the ranks of Hungary and Poland to extend the movement toward "illiberal democracy" in post-Communist Central and Eastern Europe. Whether this new trend represents a clear break with the previous hegemony of neoliberal institutions and policies is too early to tell. Nevertheless, it shows that the period of neoliberal hegemony is definitely over and the neoliberalism is being challenged by an alternative set of authoritarian and illiberal forms of constitutionalism.

As these examples of backsliding into various forms of constitutional authoritarianism in Central and Eastern Europe show, the "return to Europe" is not yet complete. Rupnik & Zielonka (2013, p. 21) offer the poignant observation that "the disturbing question is the ease with which consolidated democracies such as Hungary can experience 'democratic regression', reminding us that democracies by their very nature are never 'definitely established.'"

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